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No. 80-2043

IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT No. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, and LOUIS NESSIM,

Petitioners,

against

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF P.E.N. AMERICAN CENTER, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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This brief, Amicus Curiae, is submitted pursuant to Rule 36 of the Rules of this Court, urging affirmance of the decision below of the United States Court of Appeals for the Second Circuit, on the grounds that the actions of petitioners, the Board of Education of the Island Trees Union School District and its members (hereinafter "petitioners" or the "board"), violated the First Amendment to the United States Constitution.* Letters from the parties, consenting to the submission of this brief, have been filed with the Clerk of this Court.

*The decision of the Court of Appeals is reported at 638 F.2d 404.

INTERESTS OF THE AMICUS

Amicus, P.E.N. American Center ("P.E.N."), the United States chapter of International P.E.N., is a non-profit association of some 1800 leading American poets, playwrights, essayists, editors, novelists and translators. Its members include the authors of four of the nine books which, as described below and in the briefs of respondents and the supporting amici, were improperly removed from the shelves of a school library by petitioners.* P.E.N. is, of course, concerned by petitioners' improper suppression of books written by

* Bernard Malamud, author of The Fixer; Kurt Vonnegut, author of Slaughterhouse Five; Piri Thomas, author of Down These Mean Streets; and Alice Childress, author of A Hero Ain't Nothin' But A Sandwich, are all members of P.E.N. Mr. Malamud is P.E.N.'s immediate past President. Langston Hughes, the editor of a fifth book, Best Short Stories of Negro Writers, was a member of P.E.N. until his death in 1967.

its members.

But P.E.N.'s interest as amicus extends beyond its interest in remedying unwarranted suppression of its members' books. As an organization of writers, P.E.N. stands committed to the principle of free expression and communication of ideas and robust, open debate. As such, it is acutely sensitive to the evils inherent in allowing a government agency or official to judge and condemn a book because isolated excerpts might offend an official's sensibilities or might contain ideas contrary to his subjective philosophy; it is concerned with the use of governmental powers to block individuals from access to any ideas. No place are these dangers more threatening, or the need for independent inquiry and a diversity of views more compelling, than in an academic setting; free and open access to ideas and information

must be particularly encouraged in our public schools if today's students are to be educated to assume citizenship in our democratic society. Because of its position as an association of writers concerned with free expression, P.E.N. brings an important interest and viewpoint to bear on this dispute.

STATEMENT OF THE CASE

At the outset, it is worth noting what questions are not in issue here. This is not a case about who determines educational priorities in face of budgetary considerations; it is not a case involving the implementation of a consciously chosen educational philosophy to enrich the minds and intellect of students; it is not a case in which obscene material has been pandered to students in the guise of intellectual expansion.

This is a case that demonstrates the susceptibility of educational institutions, absent Constitutional protection, to hysterical fringe group politics.

This is a case in which "educators" claim the right to keep students ignorant and maintain that right as absolute.

This is a case in which some of the finest examples of modern literature have been stamped as inappropriate by governmental authorities because excerpts from those books offended the sensibilities or the political views of those authorities.

The facts of the case have been described in detail in the briefs of respondents and supporting amici, and in Judge Sifton's opinion for the court below. Amicus will not burden the Court with a repetition of these facts.

Amicus suggests, however, that any consideration of petitioners' actions must take into account the literature which is the essence of this controversy.

The books that the board removed from the school library are among the finest examples of modern literature. Naturally, Amicus is particularly concerned that books which

have received such uniformly high commendation can be so summarily blacklisted. The following are the books which the Board of Education, Island Trees Union Free School District has determined to be unfit for use in the education of its students:

FICTION

(a) The Fixer by Bernard Malamud, a P.E.N. member and past President. When it was published in 1967, The Fixer was awarded the Pulitzer Prize in Letters and The National Book Award. It was also placed on the American Library Association's Lists of Best Books for Young Adults and of Fiction for College Bound Students. It received favorable professional reviews and listings in the School Library Journal, Booklist, Library Journal, and Senior High School Library Catalog.

Following are excerpts from the Pulitzer Prize Jury for Fiction in 1967, awarding Bernard Malamud the Pulitzer Prize for fiction for The Fixer:

> "...The Jury recognized the fact that in an age notable for novels of self-pity, Mr. Malamud has taken the raw material of still another victim -- or an "anti-hero" -- and turned him into a heroic figure: 20th century and authentic.... With a kind of wry passion Malamud denies the modern paralyzing fear that personal goodness cannot survive the evil of history; and in doing so brings to the American novel a new and tough sense of possibility.
>
> Among other elements entering into this judgment, the Jury noted the literary skill of the novel, unobtrusive but present, as the story itself achieves the quite astonishing feat of beginning with despair and working through it to a climax of inward triumph and even a kind of ironical joy in life."

(b) Slaughterhouse Five by

Kurt Vonnegut, Jr., P.E.N. member. Shortly after its 1969 publication, Slaughterhouse Five was nominated for the National Book Award, was cited by the National Institute of Arts and Letters and received the Indiana Authors Day Award from the Indiana University Writers Conference. It was also listed on the American Library Association's 1975 List of Fifteen Years of Best Books for Young Adults. It received favorable professional reviews and listings in the School Library Journal, the Library Journal, and the Senior High School Library Catalog.

(c) A Hero Ain't Nothin' But A Sandwich by Alice Childress, P.E.N. member. When published in 1973, this book was nominated for the National Book Award in Children's Literature. It was listed on the American Library Association's List of Best Books for Young

Adults in 1973 and List of Fifteen Years of the Best Books for Young Adults in 1975. It was cited as one of the best books of the year by the School Library Journal.

The book won the Jane Addams Children's Book Award in 1974, an award sponsored jointly by the Jane Addams Peace Association and the United States Section of the Women's International League for Peace and Freedom. The award is made each year to "encourage publication of books for children which are of literary merit and contain constructive themes" and that "best promote peace, the dignity and equality of all peoples, and social justice." Literary and Library Prizes, 263 (R.R. Bowker, 9th ed. 1976).

The book also received the Woodward Park School Annual Book Award in 1974, given "for the book for

children which best demonstrates good human relations." Children's Books: Awards & Prizes 109 (Children's Book Council 1979).

The New York Times Book Review, November 4, 1973, called this book one of the outstanding books of the year in 1973, stating:

> "There are too few books that convince us that reading is one of the supreme gifts of being human. Alice Childress, in her short, brilliant study of a 13- year-old black heroin user, 'A Hero Ain't Nothin But a Sandwich,' achieves this feat in a masterly way by telling a real story of the victims of today's worst urban plague, heroin addiction, and it reaffirms the belief that excellent writing is alive and thriving in some black corners of America."

AUTOBIOGRARHIES

(d) Go Ask Alice. Go Ask

Alice is an anonymous work published in 1971. The book was listed by the American Library Association as one of the Best Books for Young Adults in 1972 and was listed on the 1975 List of Fifteen Years of Best Books for Young Adults. In addition, it received the Christopher Award in 1972 and the MAXI Award. It was elected one of the best books for Spring by the School Library Journal. It received favorable professional reviews and listings in Booklist and in Senior High School Library Catalog.

When reviewed in the November 11, 1971 edition of the Christian Science Monitor (page B, 6), it was recognized that this book's "subject is unpleasant, the language sometimes crude, the experiences often horrifying." The reviewer went on to state, however:

"And yet ... the book must be read. More than anything else, it was the lack of communication that 'Alice' felt between herself and the world of her parents, teachers, and friends, and her lack of knowledge about drugs, that proved fatal .... No one can afford not to take the drug culture seriously. And no one can read this book without aching to the waste of a compassionate and talented girl who never quite managed to escape the nightmare of drugs."

(e) Soul On Ice by Eldridge Cleaver. This book was critically acclaimed following its publication in 1968. Charlayne Hunter wrote in the March 24, 1968 edition of the New York Times Book Review that:

"'Soul on Ice' is not a book about the prison life of a black man, although a very good picture of prison life does emerge secondarily. The book is about the imprisonment of men's souls by society."

In his review in the Atlantic Monthly of June, 1968, Robert Coles wrote:

> "[Cleaver] has a sense of humor. He knows how to be astringent one minute, ironic the next. He can be tolerant and compassionate.... He is full of Christian care, Christian grief and disappointment, Christian resignation, Christian messianic toughness, and hope. He loves his lawyer, a white woman, and pours out his love to her in three beautiful, incredibly subtle and blunt and unsparing and unforgettable letters. How did he do it -- learn to write, learn the really impressive theological subtleties that are addressed to his lawyer? (They remind one of Dietrich Bonhoeffer in jail, or Dostoevsky writing from the Underground.)".

The work was awarded the Martin Luther King Memorial Prize in 1970, a prize awarded "for literary work reflecting the ideals to which Martin

Luther King dedicated his life."
Literary and Library Prizes, supra, at 414. It was also placed on the American Library Association List of Best Books for Young Adults in 1968 and the 1975 list of Fifteen Years of Best Books for Young Adults. It was favorably reviewed and listed in the School Library Journal, Booklist, Library Journal and Senior High School Library Catalog.

(f) Down These Mean Streets by Piri Thomas, P.E.N. member. Daniel Stern, reviewing Down These Mean Streets in the New York Times Book Review of May 21, 1967, describes the book as having

> "an undeniable power that I think comes from the fact that it is a report from the guts and heart of a submerged population group, itself submerged in the guts and hearts of our cities. It claims our attention and emotional response because of the honesty and pain of a life led

in outlaw, fringe status, where the dream is always to escape."

The book was cited by the American Library Association as one of the Best Books for Young Adults in 1967. It received favorable professional reviews and listings in the School Library Journal, The Library Journal and Booklist.

ANTHOLOGIES

(g) Best Short Stories BY NEGRO WRITERS, edited by Langston Hughes, P.E.N. member prior to his death in 1967. This work is a collection of 47 short stories by noted black writers including Ralph Ellison, Richard Wright, Frank Yerby, Jean Toomer, James Baldwin, Charles Chestnutt and Paul Dunbar. It received favorable professional reviews and listings in The School Library

Journal, Senior High School Library Catalog and Library Journal, which observed that "Mr. Hughes seems to have made his selections on the basis of literary style or merit." 92 Lib. J. 1760 (1967).

The editor, Langston Hughes, won a Guggenheim Fellowship in 1935, a National Institute of Arts and Letters Award in 1946, and in 1953 won the Anisfield-Wolf Award, an award given "to the best work concerned with racial problems in the field of creative literature." Literary and Library Prizes, supra, at 37-38. In 1960, he won the NAACP Spingarn Medal for literary achievement.

(h) A Reader For Writers, edited by Jerome Archer. This book is a collection of some 110 short stories or essays by noted writers including John Updike, Mark Van Doren, Arthur

Schlesinger, David Riesman, Samuel Johnson, Aldous Huxley, Robert Benchley, Francis Bacon, James Madison, Alexis de Tocqueville, Walter Lippmann, C.P. Snow, Thomas Jefferson, Jonathan Swift, Joseph Conrad, James Thurber, E.B. White, and Lionel Trilling. The editor, Jerome Archer, is Professor of English at Arizona University. This anthology was not reviewed or listed in the standard school and library media, apparently because the book was primarily distributed outside the high school market.

NON-FICTION

(i) The Naked Ape by Desmond Morris. This work received a favorable review and listing in the Library Journal of January 1, 1968. Another review in the April, 1968 edition of Choice Magazine (p.228) describes this

as "one of the better behavioral science books of the year.... Morris ... gives us a startling view of man, stripped of the facade we try so hard to hide behind."

SUMMARY OF ARGUMENT

The unique facts of this case present this Court with government censorship in blatant defiance of the First Amendment to the United States Constitution. At issue is a local school board's removal of serious literary works from school libraries without resort to evenhanded procedures or standards. The only proferred justifications for this action are that the works present philosophies differing from those held by the school board members and that they contain isolated passages which the board members deem offensive. The school board further responds that its status as a school board *ipse dixit* shields its actions from judicial scrutiny and applicable Constitutional standards.

Amicus respectfully submits

that petitioner's position is devoid of merit. It is precisely the business of the Courts to ensure that no governmental entity - school board or otherwise - acts in any way inconsistent with the First Amendment. As is argued in Point I below, recognition of a school board's need for discretion and independence in making educational and administrative determinations does not require blind deference to blatantly unconstitutional actions. Rather, the nature of the First Amendment interests must first be determined; only then can the needs of a school board be accomodated - and then only to the extent necessary.

As argued in Point II below, petitioners' actions in this case admittedly involve the suppression of ideas with which they disagree. This the First Amendment prohibits. By

purging a school library of works which they find inconsistent with personal philosophies, the school board created the very opposite of the marketplace of ideas the First Amendment protects.

In Point III below, Amicus argues that seizing upon isolated passages of serious, important texts and stamping them dirty or unfit for youth, without any consideration of their literary context or emotive content, flies in the face of cardinal principles of First Amendment law.

And doing all of this in the total absence of any articulated standard, solely on the basis of subjective taste, cannot be anything other than an absolute disregard of established First Amendment jurisprudence, as is argued in Point IV below.

For all of the foregoing reasons, and as demonstrated below,

Amicus respectfully submits that long-standing First Amendment principles and precedents require the affirmance of the decision below.

ARGUMENT

PETITIONER'S ACTIONS VIOLATE THE FIRST AMENDMENT

This case raises important First Amendment issues in the context of public education. Public schools have an essential mandate in training young adults for intelligent participation in our pluralistic, democratic society. To fulfill this goal, they are entrusted with the task of ensuring that students receive "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

This case presents an attempt by members of a local school board to frustrate that principle. At issue are actions by school board officials which have at their source not the protection

of pupils, but rather the insulation of those pupils by narrowing the spectrum of ideas to which they can be exposed in a public school setting. This they accomplished by removing from the shelves of a school library serious literary works, fiction and non-fiction, which advance viewpoints and contain passages that those officials find inconsistent with their own personal and undeniably subjective philosophies.

It is not even seriously suggested that this removal was either accomplished under any particular specified procedure, or was the result of an even-handed application of uniform, educationally inspired principles.

Rather, petitioners attempt to justify their content-based removals by arguing (a) that their public office entitles them to remove books inconsis-

tent with their particular viewpoints, and (b) that isolated excerpts from these books, taken wholly out of context, contain offensive language. Petitioners' real argument appears in substance to be that simply because their actions are those of a school board some undefined and impenetrable shield protects them from review by this Court to redress these First Amendment violations.

As demonstrated below, and in the briefs submitted by respondents and supporting amici, the range of discretion permitted a school board, while perhaps broader than that of some other governmental entities, is nonetheless bounded by the principles of the First Amendment. Petitioners' actions here have overstepped those bounds.

I. Petitioner's Actions are Subject to First Amendment Limitations

Petitioners argue that, the First Amendment notwithstanding, the federal courts should not pass upon their "educational" decisions. Appellant's Brief at pp. 13-16, 22-24.

Amicus does not dispute the need for school officials to have considerable latitude in their determinations. Amicus respectfully suggests, however, that the First Amendment is not circumscribed by blind deference to school board decisions. Rather, the proper approach is to determine first what the First Amendment prescribes and only then -- and only to the extent necessary -- accomodate the admitted need for latitude in educational and administrative determinations.

It is a cardinal principle of First Amendment jurisprudence that the

government "must remain neutral in the market-place of ideas." F.C.C. v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). See also, Madison School District v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976).

As Justice Jackson, writing for the Court, observed in West Virginia State Board of Education v. Barnette:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion .... If there are any circumstances which permit an exception, they do not now occur to us." 319 U.S. 624, 642 (1943).

The locus of the instant controversy in the public schools does not inherently limit these First Amendment principles. To the contrary, this Court has repeatedly cautioned that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," Shelton v. Tucker, 364 U.S. 479, 487 (1960) and has described "[t]he classroom as "peculiarly the 'marketplace of ideas.'" Keyishian v. Board of Regents, 385 U.S. 589,603 (1967).

As this Court has firmly established, school boards, like other governmental agencies, are subject to constraints imposed by the Constitution:

> "The Fourteenth Amendment ... protects the citizen against the State itself and all of its creatures - Boards of Education not excepted. These have, of course,

> important delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

Although boards of education may have a considerable range of legitimate discretion, they do not have a roving commission to determine that only their own particular views are legitimate and that others are intolerable and to be excluded. To hold otherwise would allow school boards to "cast a pall of orthodoxy over the classroom" contrary to the mandates of a long and uncontradicted line of First Amendment cases in the public school context. Keyishian

v. Board of Regents, 385 U.S. 589, 603 (1967); see, e.g., Tinker v. Des Moines Independent School Community District, 393 U.S. 503 (1969); Epperson v. Arkansas, 393 U.S. 97 (1968); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Meyer v. Nebraska, 262 U.S. 390 (1923). It against this standard that petitioner's actions must be judged.

II. Petitioners' Removal Of Serious Literary Works Because Of Ideological Condemnation Of Their Contents Violates The First Amendment.

Defendants have not disputed the fact that their removal of various of the books was based on disapproval of the ideas and values the books advance. The books first came to the board's attention as the result of a conference sponsored by an issue-oriented pressure

group, PONY-U, whose literature criticized one book as the work of a Black Panther, and condemned another for praising Malcolm X. Armed with a blacklist supplied by PONY-U, the board members scoured the school library to remove the books on the list, an action it subsequently defended in one press release on the grounds that some of the books were assertedly "anti-American", "anti-Christian", and "blasphemous." The board has since defended the exclusions on the grounds that the books contained material contrary to the board members' "conservative philosophy".

Petitioner's actions effect precisely what the First Amendment forbids: censorship of ideas via official condemnation. That this is the result of the petitioners' personal distaste for certain philosophies further exacerbates the First Amendment

offense.*

*This case is thus clearly distinguishable from F.C.C. V. Pacifica Foundation, supra, in which Justice Stevens made clear in his plurality opinion that "[i]f there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content ... First Amendment protection might be required." 438 U.S. at 476. In contrast, plaintiff's claim in this case is precisely that the books were removed because of disagreement with the viewpoints expressed. In addition, as Justice Stevens emphasized, the "narrow" decision in Pacifica hinged on the unique character of radio broadcasts, which (a) confront unwilling listeners "in the privacy of the home" (438 U.S. at 478), and (b) are accessible to very young children, "even those too young to read." (438 U.S. at 479). These factors are, of course, not present here. Finally, whatever value the George Carlin monologue, at issue in Pacifica, may have had in the exposition of ideas, there can be no dispute but that the books removed by the board in this case are serious works of literature and social commentary, whose primary focus is the exposition of ideas that go to the heart of the interests protected by the First Amendment. Compare Pacifica, 438 U.S. at 746 (Stevens, J.).

A. A School Board, Like Any Other Governmental Entity, May Not Officially suppress Ideas

Obviously, the content-based decision to remove "objectionable" books makes student access to them more difficult and indeed impossible through the school library (which of course remains open to books containing "approved" viewpoints).

But the removals also have an equally if not more significant symbolic impact: they communicate a clear message of official condemnation of the viewpoints suppressed. As Judge Newman observed in his concurrence below:

> "The symbolic effect of a school's action in removing a book solely because of its ideas will often be more significant than the resulting limitation upon access to it." 638 F.2d at 434.

This is because it:

> "signal[s] to the students and

> the teachers an official message that the ideas presented in those books are unacceptable, are wrong and should not be discussed or considered. The chilling effect of this message on those whou would express the idea is all too apparent."Id.*

Amicus recognizes that one function of education is to inculcate in youth certain basic values. The point, however, is that the inculcation of certain ideas does not justify the supression of others. As Judge

*We need not delineate here the circumstances in which First Amendment issues are raised by a decision to not acquire a given text, as distinguished from a removal of texts already acquired. We do note, however, that since all books cannot be acquired, acquisition decisions are likely to involve economic considerations not present in a decision to remove a book that is already on the shelves. In addition, non-acquisition does not generally operate to single out for official disapproval any particular text from the millions of texts not acquired. Accordingly, it would no doubt be only the very rare case in which an acquisition decision would convey a message of official condemnation of a viewpoint with the same clarity as does an official decision to remove a book from the library shelves.

Newman eloquently observed:

> "It is one thing to teach, to urge the correctness of a point of view. But it is quite another to take any action that condemns an idea, that places it beyond the pale of free discussion and scrutiny.
>
> * * *
>
> "Those in a school community have a right to be free not only from prohibition and unwarranted regulation of expression. They have a right to be free from official conduct that tends to suppress ideas -- conduct conveying the message that some idea or viewpoint is not merely unsound, but is not acceptable to be aired within the school community." Id. at 432-433, 433.

Simply stated, such symbolic official condemnation impermissibly compromises the government's constitutionally-mandated neutrality in the marketplace of ideas.*

*The fact that the board's actions fail
(footnote continued on next page)

*(footnote continued)
to effect a total ban is not constitutionally significant. This Court has recognized that a message of official condemnation short of a total ban can violate the First Amendment more subtly but just as surely as would a total ban. Thus, in Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), the Court struck down a statutory scheme under which a state "Commission to Encourage Morality in Youth," inter alia, classified books as acceptable or "objectionable" pursuant to a statutory mandate to "educate the public concerning any book containing obscene, indecent, or impure language, or manifestly tending to the corruption of the youth as defined [by the statute]." 372 U.S. at 59-60. See also, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 n.8 (1975); Interstate Circuit v. Dallas, 390 U.S. 676 (1968). And once again quoting from Judge Newman's concurring opinion: "[t]he impact of burning a book does not depend on whether every copy is on the fire." 638 F.2d at 434.

B. Petitioners' Personal Predilictions Provide Insufficient Bases For The Actions Taken

The Constitution does not allow government officials to purge libraries any more than to purge movie screens or street corners of expressions inconsistent with their particular philosophies. The board members' disagreement with particular viewpoints is simply not a legitimate basis for their exclusion of a book. Having created a library, and indeed having already placed these books on the shelves, the board cannot then remove them because of "philosophical" objections to the viewpoints expressed.*

*In Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976) the court observed: "Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School (footnote continued on next page)

Cf., Widmar v. Vincent, __ U.S. __ , 50 U.S.L.W. 4062 (Dec. 8, 1981).

As this court stated in Tinker v. Des Moines Independent School Community District, supra:

> "In our system, students may not be regarded as close-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." 393 U.S. at 511.

Since the First Amendment does not protect the expression of only those views to which the board members adhere, the board's disapproval of particular ideas does not justify its exclusion of works containing them. Such exclusion

*(footnote continued)
or to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members."

is similar to the governmental action considered and rejected in Kingsley International Pictures Corp. v. Regents of the University of New York, 360 U.S. 684 (1959). In that case, the Motion Picture Division of the New York Education Department found isolated scenes of the movie "Lady Chatterley's Lover" to be "immoral", a finding that was subsequently upheld by the Regents of the University of the State of New York and by New York courts on the theory that the "picture as a whole 'alluringly portrays adultery as proper behavior.'" 360 U.S. at 687. This Court without dissent struck down New York's suppression of this "immoral" viewpoint as a violation of the First Amendment:

> "What New York has done ... is to prevent the exhibition of a motion picture because that picture advocates an idea

> -- that adultery ... may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionaly protected liberty." 360 U.S. at 688-89.

To the same effect is the decision in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), holding that an official finding that a film was "sacrilegious" could not justify its suppression. As the Court there observed, "[i]t is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures." 343 U.S. at 505.

In sum, petitioners' actions, based upon their personal ideologies, and constituting government censorship, stand in stark defiance of established First Amendment law.*

*The Constitutional infirmities in the board's book removals are not cured simply because its "conservative philosophy" may be shared by a portion -- or even a majority -- of the local community. To quote again from the Court's opinion in West Virginia State Board of Education v. Barnette:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." 319 U.S. at 638.

III. Content-Based Removals of Serious Literary Works Cannot Be Justified on the Grounds That Isolated Excerpts, Taken Out of Context, Contain "Offensive" Language.

As noted above, petitioners also seek to justify their book removal on the ground that isolated excerpts taken out of context contain language objectionable to the board members. This "objectionable language" justification must be rejected for several reasons.

The board's focus on isolated passages flies in the face of the established principle of First Amendment jurisprudence that the protected character of expression is to be determined on the basis of the expression "taken as a whole", and not on the basis of isolated excerpts. Miller v. California, 413 U.S. 15, 24 (1973). If a "quotation from Voltaire

in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication", Kois v. Wisconsin, 408 U.S. 229, 231 (1972), then an isolated objectionable passage cannot condemn an otherwise protected piece of serious literature or social criticism. Defendants' theory that non-obscene, serious literature can be supressed because of isolated, objectionable passages does not have a shred of support in First Amendment jurisprudence.

An "isolated excerpts" standard -- even if implemented even-handedly by local boards -- would lead to the wholesale suppression of the Bible, Shakespeare and most other serious literature, along with the contemporary classics condemned here.*

*See FCC v. Pacifica Foundation, supra, 438 U.S. at 771, n.5. (Brennan, J. dissenting)

Amicus does not pretend that the works condemned by the board contain only words that might be spoken by a Mary Poppins or by a Rebecca of Sunnybrook Farm. They don't. But neither are the social milieus described in those books the same fairy tale worlds inhabited by those fictional characters. Books like Soul on Ice, The Fixer, and Down These Mean Streets describe tougher, less polite worlds and do so in tougher, less polite language.

This Court has recognized that the First Amendment protects not only the distilled cognitive content of expression but also the emotive form in which that content is cast. As Justice Harlan wrote for the Court in Cohen v. California:

> "[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function, which practically speaking, may often be the more important element of the overall message sought to be communicated." 403 U.S. 15, 26 (1971).

In Cohen v. California, this reasoning was applied to protect Mr. Cohen's wearing of a crudely defaced jacket; it must inevitably have much greater force in the context of serious social commentary and the "subtle shaping of thought which characterizes all artistic expression." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952). Literature like that sup-

pressed here is, of course, much more than the sum of its ideas: it is an alchemy from which form and content cannot be neatly separated without losing a total effect. As the court recognized in United States v. One Book Called "Ulysses", 5 F.Supp. 182, 184 (S.D.N.Y. 1933), aff'd, 72 F.2d 705 (2d Cir. 1934), even though a serious literary work may be "disgusting" in places and may contain "many words usually considered dirty," nonetheless: "[e]ach word of [a] book contributes like a bit of mosaic to the picture which [the author] is seeking to construct for his readers."

Moreover, as this Court observed in Cohen, there are some ideas that are inevitably expressed, and perhaps only expressible, in language that some may find offensive:

> "... [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results." 403 U.S. at 26.

This teaching -- that particular language cannot be suppressed without risking the suppression of serious ideas -- is especially apt with respect to the books condemned by the school board here. Excerpts from Soul on Ice by Eldridge Cleaver, the former Minister of Information of the Black Panther party, may be inevitably "offensive" to some. See, Brown v. Oklahoma, 408 U.S. 914 (1972) (Powell, J. concurring) (observing that "it might well have been

anticipated" that the language of a speaker presenting "the Black Panther viewpoint" would offend some listeners). The same may be true of the descriptions of ghetto life in a book like Down These Mean Streets or the story of anti-semitism in tsarist Russia in The Fixer. But if these books contain isolated offensive passages, it is because the realities they describe contain at least isolated offensive incidents; suppression of the books because of offensive passages would inevitably suppress the full force of the ideas and messages they convey,* which as argued above, is itself unconstitutional.

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* Judge Newman seemed to recognize the possibility that this justification is but pretense when he wrote:

> "the bona fides of a school's claim of concern with vulgarity or sexual

(footnote continued on next page)

IV. Petitioners' Content-Based Removals Were Based On Non-Existent Standards

The gravity and danger of the removal of books in situations like that presented here is exacerbated by the fact that the removal here was not made in reliance on <u>any</u> standard other than the degree to which books' viewpoints and language coincided or clashed with the board members' social philosophies and notions of good taste. The sole criteria for judgment were the personal

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*(footnote continued)
explicitness may be refuted by evidence that other books with similar passages were not removed. A school's effort to regulate vulgarity is not unconstitutional because it is not completely thorough, but if only isolated examples are condemned, the inference will be strengthened that vulgarity was the excuse, not the reason, for book removal whose principal, or at least partial motivation was political." 638 F.2d at 437.

views, reactions, and biases of the board members. Such unbounded, standardless discretion could lead to equally unbounded and discriminatory exclusion of views.

This Court has been vigilant in protecting expression from restrictions even when based on codified but "vague" standards. For example, in Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968), the Court struck down as unconstitutionally vague a city ordinance that required a license for the showing of films found by a Motion Picture Classification Board to be "unsuitable for young persons," a phrase which was defined at some length in the ordinance. See also, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

The board's ad hoc action here, however, was not even bounded by standards such as rigorous as those

found too loose in Interstate Circuit, supra; it was bounded by no pre-existing standard at all. In these circumstances the board -- like the censor under the New York statute considered in Joseph Burstyn, Inc., supra -- is "set adrift...amid a myriad of conflicting currents of religious [and philosophical] views with no charts but those provided by the most vocal and powerful orthodoxies." Joseph Burstyn, supra, 343 U.S. at 504-05.

A grave danger in any judicial endorsement of the board's action here is that it would operate as an invitation to such "vocal and powerful orthodoxies" (like PONY-U, whose "conference" inspired the board's action here) to promulgate blacklists and bombard school boards with vociferous demands that libraries be cleansed of books espousing views not in harmony

with their own. We submit that to allow curriculum and library removal decisions to be subject to such pressure is to pave the way for the disruption of public education and the destruction of the classroom as the "market-place of ideas."

We further submit that the possibility of occasional judicial review in those rare situations where a book has been removed in condemnation of its ideas is not the real threat to the orderly operation of school boards in situations analogous to the case at bar; that threat lies instead in the spectre of persistent pressures to narrow debate and to prune library shelves to suit the demands of "vocal and powerful orthodoxies." To paraphrase Judge Mansfield, dissenting below (638 F.2d at 425), if each pressure group were free to insist that library books be removed

to suit its views, chaos would ensue. Since the essence of education lies in the robust exchange of competing ideas, this Court should not sanction the suppression of books expressing viewpoints or containing messages disapproved of by a pressure group or a pressured school board.

CONCLUSION

For the foregoing reasons, and those stated by respondents and supporting amici, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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